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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner
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Commissioner
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Commissioner

Arizona Corporation Commission
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IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION AND APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS

DOCKET NO. T-01051B-07-0693
T-03608A-07-0693

NOTICE OF FILING

Pursuant to the Arbitrator's request made at the hearing on May 7, 2008, Qwest Corporation ("Qwest") hereby files the Application for Rehearing, Reargument or Reconsideration of Decision No. C08-0414 which was filed by Qwest on May 8, 2008 in the Public Utilities Commission of the State of Colorado.

RESPECTFULLY SUBMITTED this 9th day of May, 2008.

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

Docket No. 07B-514T

IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996

QWEST CORPORATION'S APPLICATION FOR REHEARING, REARGUMENT OR RECONSIDERATION OF DECISION NO. C08-0414

Qwest Corporation ("Qwest"), through its undersigned counsel, and pursuant to Rule 1506 of the Colorado Public Utilities Commission's ("Commission's") Rules of Practice and Procedure, 4 CCR 723-1-1506, respectfully submits this application for Rehearing, Reargument or Reconsideration ("RRR") of a certain portion of the Commission's Decision No. C08-0414 (Mailed Date April 18, 2008) (the "Decision"). The Decision sets forth the Commission's rulings relating to the open issue between Qwest and Arizona Dialtone, Inc. ("AZDT") in this interconnection arbitration conducted pursuant to Section 252 of the Telecommunications Act of 1996 (the "Act") and dealing with an interconnection agreement ("ICA") amendment addressing certain changes that the Federal Communications Commission ("FCC") made in its *Triennial Review Order* ("*TRO*") and *Triennial Review Remand Order* ("*TRRO*").[1]

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[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), corrected by *Triennial Review Order Errata*, 18 FCC Rcd 19020 (2003); *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*")

INTRODUCTION AND SUMMARY OF POSITION

For the reasons set forth below, Qwest respectfully submits that the portion of the Decision pertaining to the post-*TRRO* transition rate between March 10, 2006 and July 19, 2007 (providing for the ability of Qwest to back-bill (or "true-up") only the *TRRO* transition rate of the UNE Platform ("UNE-P") rate, "plus $1"), is *unlawful* because it violates the Act in that impermissibly sets rates for network elements (unbundled switching) that Qwest is no longer obligated to provide under Section 251 of the Act, and that Qwest therefore provides under Section *271* of the Act. The Commission, however, does not have authority to set rates under Section 271, and the Commission has previously recognized that lack of authority. See Decision No. C06-1280, *In the Matter of the Review of Certain Wholesale Rates of Qwest Corporation*, Docket No. 04M-11T (Mailed Date October 31, 2006 ("Decision No. C06-1280").

In addition, wholly apart from the Commission's legal error in violating the Act, the portion of the Decision at issue is also *unjust* and *unwarranted* in its finding that Qwest was partially "at fault" with respect to the negotiations required under the *TRRO*, and thus in approving a TRRO Amendment that provides for back-billing (or "true-up") of only the *TRRO* transition "UNE-P plus $1" rate for that March 10, 2006 to July 19, 2007 period. The Decision is especially unjust and unwarranted because the end result is that Qwest would be able to recover at most only about ***35%*** of the amounts it has planned to back-bill AZDT, despite that Qwest did not fail to negotiate in good faith, while AZDT clearly failed to negotiate in good faith and continued to drag its feet throughout the negotiation process. Finally, to the extent that the Commission was attempting to balance the equities here, or come to a middle-ground compromise resolution, Qwest respectfully submits that this portion of the Decision is based on the Commission not fairly weighing the equities here. Indeed, the Decision sends an improper signal to parties to interconnection agreement negotiations that it is in their financial interests to delay and to not negotiate in good faith for changes of law that do not benefit such parties.

Accordingly, Qwest respectfully submits that the Commission should grant Qwest's motion for rehearing, reargument or reconsideration, and therefore, find that the parties must

enter into the TRRO Amendment that Qwest submitted in this proceeding. Qwest's TRRO Amendment provides for back-billing of Qwest's month-to-month Public Access Line ("PAL") and Plain Old Telephone Service ("POTS") resale rate for the entire *TRRO* post-transition period from March 10, 2006 to the present.

BRIEF SUMMARY OF THE DECISION

In its Decision, the Commission addressed the pertinent background of this arbitration proceeding pertaining to Qwest's TRRO Amendment and the remaining issue, Issue 4 (TRRO Amendment Attachment 1, §§ 2.3, 5.1.1.4 and 5.1.1.5), including a summary of the FCC's *TRRO* (Decision, pp. 5-7, ¶¶ 12-15), the history of the parties' *TRRO* negotiations (Decision, pp. 7-13, ¶¶ 16-32), a summary of the parties' positions (Decision, pp. 13-21, ¶¶ 33-54) and the Commission's resolution of Issue 4 (Decision, pp. 21-23, ¶¶ 55-63).

In a nutshell, the Commission's Decision ordered that the parties adopt Qwest's proposed TRRO Amendment language in part, and found that neither Qwest nor AZDT followed the directives of the *TRRO*, and that neither party negotiated in good faith as required by Section 251(c)(1) of the Act. Decision, ¶ 55. Specifically, the Commission discussed certain things that Qwest did or did not do throughout the negotiations (Decision, ¶¶ 55, 56), and that AZDT did or did not do during the negotiations (Decision, ¶ 57). The Commission further stated that the *TRRO* provided for a UNE-P plus $1 default rate for the 12-month transition period (March 11, 205 to March 10, 2006), but did "not contemplate what was to happen if carriers fail to reach agreement after the transition period is over." Decision, ¶ 58. The Commission then indicated that Qwest "contributed" to the parties' failure to reach agreement to modify the ICA because it did not 1) terminate the ICA, 2) follow through with dispute resolution, or 3) pursue arbitration. *Id.*, ¶ 59. The Commission then noted that the parties had effectively suspended negotiations on the TRRO Amendment from June 2006 to July 2007 pending the outcome of Qwest's appeal of an Arizona Commission decision in the Qwest/Covad arbitration in that state. *Id.*, ¶ 60.

Finally, the Commission found it appropriate to approve Qwest's language providing for the back-billing of the "UNE-P plus $1" rate during the transition period of March 11, 2005

through March 10, 2006. Decision, p. 22, ¶ 61. The Commission further approved language for the plus $1 *TRRO* transition rate from March 10, 2006 through July 19, 2007. *Id.*, pp. 22-23, ¶ 61. Finally, for the period from July 20, 2007 to the present, the Commission found that "AZDT should have realized the legal implications of the [Arizona] District Court order reversing [the Arizona Commission's Covad arbitration order] and at that time entered into a negotiated ICA amendment [implementing the *TRO* and *TRRO*], rather than forcing the matter to proceed arbitration." *Id.*, p. 23, ¶ 61. The Commission therefore approved language allowing Qwest to back bill for the difference between the UNE rate and the month-to-month resale service rate from the July 2007 date of the Arizona district court decision in the Covad arbitration to the present. *Id.*, p. 23, ¶ 62. The Commission concluded by ruling that the actual amounts owed to Qwest to comply with the TRRO Amendment would be decided in Docket No. 07-520T. *Id.*, p. 23, ¶ 63.

ARGUMENT

I. The portion of the Decision setting the "UNE-P plus $1" rate from March 10, 2006 to July 19, 2007 violates the Act

Preliminarily, and as a legal matter, the portion of the Decision setting the "UNE-P plus $1" rate from March 10, 2006 to July 19, 2007 violates the Act because it impermissibly sets rates for network elements (unbundled switching) that Qwest is no longer required to provide under Section 251(c)(3) during that time period. Although Qwest continues to have an obligation to provide switching under Section *271* of the Act during that time period, the Commission does not have such authority to set the rates for those Section 271 switching elements in an ICA arbitrated under Section 252.

A. Sections 251 and 271 impose different unbundling obligations and different pricing schemes for network elements

To open local markets to competition, Congress imposed certain duties on all local exchange carriers in Section 252(b), and other duties in Section 251(c) that apply only to ILECs. Of particular significance, Section 251(c)(3) requires ILECs to provide CLECs with leased access to unbundled network elements ("UNEs") – a term of art that refers to certain piece-parts

of the ILECs' networks – at regulated rates. The UNEs that ILECs must provide are limited to those the FCC has determined meet the "impairment" standard in Section 251(d)(2).[2] Only if the FCC makes a determination under Section 251(d)(2) that CLECs will be competitively "impaired" without access to a network element must an ILEC provide the element as a UNE under Section 251(c)(3). The rates that apply to UNEs are set by state commissions applying the FCC's Total Element Long Run Incremental Cost ("TELRIC") pricing methodology. See e.g., First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. at 15499, 15844, ¶ 672 (1996).

The FCC's *TRRO* establishes that CLECs are not impaired without access to – and cannot lease as UNEs at TELRIC rates – multiple network elements, including local switching. However, the "competitive checklist" in Section 271 of the Act requires Bell Operating Companies ("BOCs") like Qwest to provide access to certain network elements -- including local switching -- as a condition to being permitted to provide interstate toll (long distance) service in their designated incumbent geographic regions. This obligation applies even if the FCC has determined that there is no longer a duty to provide these elements as UNEs under Section 251, as the FCC did in the *TRRO*.

Importantly, there are fundamental differences between UNEs provided under Section 251 and network elements that a BOC provides under Section 271. *TRRO,* at ¶ 199. Most significantly, BOCs are not required to provide Section 271 elements at the TELRIC rates that apply to Section 251 UNEs. Instead, prices for these elements are governed by the "just, reasonable, and nondiscriminatory rate standard of sections 201 and 202" of the Communications Act of 1934. *TRO,* at 17389, ¶ 663. Under this standard, BOCs may charge a market-based rate. Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 473 (1999); *see also TRO,* at

[2] Section 251(d)(2)(B) requires the FCC to determine whether "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." (Emphasis added.)

¶¶ 656-664. Further, as discussed below, the FCC alone has the authority to set rates for Section 271 elements, and state commissions have no authority to address those rates.

In this case, since the FCC has determined in the *TRRO* that unbundled switching, and thus UNE-P, is no longer a "UNE" that is required to be provided by Qwest under Section 251 of the Act, Qwest is *only* obligated to provide local switching to AZDT pursuant to Section 271, and that rate must be based upon a market rate. The Qwest Platform Plus ("QPP") and month-to-month resale PAL/POTS service offerings are entirely consistent with the FCC's removal of unbundled switching from Section 251, and its rulings that market-based rates apply to switching and other network elements that have been removed from Section 251, but that BOCs continue to provide under Section 271.

B. This Commission does not have authority to review or otherwise set rates for Section 271 elements

The Decision's setting of the "UNE-P plus $1" rate for the *TRRO* post-transition period from March 10, 2006 to July 19, 2007 violates the Act because it presumes that the Commission has authority to review and set rates for the switching that Qwest provides pursuant to Section 271. However, that presumption was squarely rejected in *Qwest Corporation v. Arizona Corporation Commission,* 496 F. Supp. 2d 1069 (D. Ariz. 2007) (the federal court decision which reversed the Arizona Commission's arbitration order in the Covad/Qwest arbitration and which was the basis for the negotiations being put on hiatus here), as well as every other court to address that issue. Indeed, in that case, the federal court permanently enjoined the Arizona Commission from conducting a proceeding to set rates for Section 271 elements. This Commission has also held that it does not have the authority to set the rates for Section 271 elements in Decision C06-1280.

The federal court in Arizona, in addressing the Arizona Commission's position that Section 271 grants state commissions implementation authority, found that the Arizona Commission's "interpretation of the Act makes no textual sense." 496 F. Supp. 2d at 1069. The federal court explained that Congress "'unquestionably' took 'regulation of local

telecommunications competition away from the States,' and required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations." *Id.* (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 378, n. 6) (citing *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 494 (7th Cir. 2004); *Southwestern Bell Tel. L.P. v. Missouri Public Service Comm'n*, 461 F.Supp.2d 1055, 1058 (E.D. Mo. 2006)). Accordingly, state commissions are *not* permitted to regulate local telecommunications competition "except by express leave of Congress." *Id.* (citing *MCI Telecommunications Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 510 (3d Cir. 2001)). The federal court further explained that "the plain terms" of the Act make it clear that Congress did not grant state commissions any authority to impose requirements under Section 271. The court also emphasized that the only role of state commissions under Section 271 is to consult with the FCC concerning a BOC's compliance with that section, and that the arbitration authority granted to state commissions in Section 252 only permits such commissions to impose requirements concerning the duties created by Section 251, not Section 271. *Id.* at 1077. The FCC alone has the authority to enforce the requirements of Section 271, and state commissions are preempted from interfering with those requirements. *Id.* at 1076-77.

Of particular relevance for purposes of this motion for reconsideration, the federal court ruled that the Arizona Commission had no authority to dictate the rates that Qwest must charge for Section 271 elements. The court found that because "the [Arizona Commission] does not have the authority or jurisdiction to impose Section 271 requirements in ICAs, it follows that *the [Commission] does not have [the] authority to set the prices for those Section 271 elements*." *Id.* (Emphasis added.)

The Arizona federal court ruling, which was in the appeal that formed the basis for the negotiations essentially being put on hiatus (despite Qwest's objections), is also consistent with the rulings of the 11 other federal courts that have addressed this issue. See *Verizon New England v. Maine Public Utils. Commission*, 509 F.3d 1 (1st Cir. 2007); *Illinois Bell Tel. Co. v. Hurley,* No. 05 C 1149, 2008 WL 239149 (N.D. Ill., Jan. 28, 2008); *BellSouth*

Telecommunications, Inc. v. Georgia Pub. Service Comm'n, No. 1:06-CV-00162-CC, slip op. (N.D. Ga., Jan. 3, 2008); *Michigan Bell Tel. Co. v. Lark,* No. 06-11982, 2007 WL 2868633 (E.D. Mich., Sept. 26, 2007), *appeals pending,* Nos. 07-2469, 07-2473 (6th Cir.); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n,* No. 06-65-KKC, 2007 WL 2736544 (E.D. Ky., Sept. 18, 2007); *Illinois Bell Tel. Co. v. O'Connell-Diaz,* No. 05-C-1149, 2006 WL 2796488, (N.D. Ill., Sept. 28, 2006); *DIECA Communications, Inc. v. Florida Pub. Serv. Comm'n,* 447 F. Supp. 2d 1281 (N.D. Fla. 2006); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n,* 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *appeals pending,* Nos. 06-3701, 06-3726, 06-3727 (8th Cir.); *Verizon New England, Inc. v. New Hampshire Pub. Utils. Comm'n,* No. 05-cv-94, 2006 WL 2433249 (D.N.H. Aug. 22, 2006), *aff'd, Verizon New England,* 2007 WL 2509863; *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n,* 368 F. Supp. 2d 557 (S.D. Miss. 2005); *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 (S.D. Ind. 2003), *aff'd*, 359 F.3d 493 (7th Cir. 2004). There is *not a single ruling in the country* that goes the other way.

Thus, although there is no Colorado or Tenth Circuit decision on this issue of which Qwest is aware (although this Commission has previously addressed this issue, as discussed below), there is no question this Commission may not set a rate for switching that Qwest is no longer obligated to provide to AZDT (under Section 251), even if Qwest is obligated to provide switching under Section 271. Since the Commission did exactly that in setting the UNE-P plus $1 rate for the post-*TRRO* transition period from March 10, 2006 to July 19, 2007 in its Decision, Qwest respectfully submits that this portion of the Decision is unlawful and should be reversed.

Moreover, *this Commission* itself has ruled that "the Commission's jurisdiction is limited to review of wholesale rates for network elements required by Section 251 and 252 of the 1996 Act, but we may not review wholesale rates for Section 271 elements." Decision C06-1280, ¶ 51. In reaching this conclusion, the Commission noted that "[n]or do we see how Sections 271's mandate that Bells comply with Sections 251 and 252 -- which is not at issue in the present determination -- allows for state authority over 271 elements." *Id.*, ¶ 47. Said the Commission:

> We also do not view our continuing obligation to arbitrate interconnection agreement disputes as providing authority to price Section 271 elements. To the extent there are disagreements as to the pricing of Section 251-52 elements, we may resolve them; but any disputes over pricing of Section 271 elements will have to be referred to the FCC for resolution. *Id.*, ¶ 49.

Finally, the Commission ruled that the fact that "agreements addressing Section 271 elements must be filed with state commissions for approval also does not open the door for state commission pricing of these elements," and that "[w]hile Congress required that 'any' interconnection agreement must be filed with state commissions for approval, § 252(e)(1), it made no allowance for state commission authority to price Section 271 elements." *Id.*, ¶ 50.

Accordingly, Qwest respectfully submits that the portion of the Decision setting the "UNE-P plus $1" rate from March 10, 2006 to July 19, 2007 violates the Act because it impermissibly sets rates for network elements (unbundled switching) that the *TRRO* ruled Qwest is no longer obligated to provide under Section 251 of the Act, even if Qwest must still provide switching under Section 271 of the Act. As such, Qwest respectfully submits that the Commission should *reverse* that portion of the Decision, and therefore find that Qwest is entitled to back-bill the month-to-month resale rate for the entire *TRRO* post-transition period beginning on March 10, 2006 to the present, and thus approve the TRRO Amendment language that Qwest has submitted here in its entirety.

II. The evidence showed that Qwest negotiated in good faith- Qwest's actions do not show a failure to negotiate in good faith, but rather, such actions showed good faith

Qwest respectfully submits that in addition to the legal error discussed above, the portion of the Decision setting a UNE-P plus $1 rate for the March 10, 2006 to July 19, 2007 period is also *unjust* and *unwarranted*, especially because it does not provide Qwest with a full true-up of the amounts at issue for that time period. Indeed, the true-up results in, at best, only about a *35%* true-up (and AZDT has recently argued, after the Decision, for an amount that would be less than 25%). More specifically, the Decision in that regard is unjust and unwarranted because it is premised on finding that Qwest was partially "at fault" in the negotiation process. However, the evidence showed that although Qwest was ultimately unsuccessful in negotiations due to

AZDT's clear *foot-dragging* and *bad faith negotiation tactics*, Qwest certainly negotiated in good faith throughout the relevant time period, and it was *solely AZDT* who failed to negotiate in good faith and who frustrated Qwest's efforts. The evidence further showed Qwest's actions (or inactions) throughout this time period did not demonstrate bad faith, but to the contrary, showed good faith in attempting to work with AZDT to try to resolve the ICA issues with AZDT.

In paragraph 55 of the Decision, which is the first paragraph of the Commission's resolution of the remaining issue (Issue 4), the Commission found that "neither Qwest nor AZDT followed the directives of the *TRRO*," and that "neither party negotiated in good faith as required by § 251(c)(1) of the Act." Decision, ¶ 55. The Decision then cites to five different things that Qwest either did or did not do in its dealings with AZDT. Specifically, the Commission cited to the following: (1) Qwest made no effort to terminate the ICA; (2) Qwest continued to provide unbundled UNE-P services to AZDT; (3) Qwest continued to bill AZDT for such services at the unbundled rate in the ICA; (4) Qwest continued to accept AZDT's payments at the UNE-P rate; and (5) Qwest continued to accept new orders from AZDT for local circuit switching. *Id.*

Qwest has no quarrel with these factual statements about what Qwest did or did not do in its dealings with AZDT. However, Qwest strongly disagrees with, and thus seeks rehearing, reargument or reconsideration of, any finding that such actions (or inactions) by Qwest somehow constituted failures to negotiate in good faith. This is especially so under the circumstances of an extremely recalcitrant and uncooperative CLEC who clearly was dragging its feet and acting in bad faith throughout the process. For these reasons, and those set forth below, Qwest's actions or inactions under the circumstances cannot reasonably be said to have demonstrated a failure to negotiate in good faith. To the contrary, such conduct affirmatively showed how Qwest bent over backwards and negotiated in good faith in trying to resolve these issues with this uncooperative CLEC.

A. Qwest's making no effort to terminate the ICA showed its good faith

The first example cited in the Decision regarding its findings that neither party negotiated in good faith was that "Qwest made no effort to terminate the ICA." Decision, ¶ 55. That is a

true statement as far as it goes, but Qwest's not terminating the parties' ICA did not show a failure to negotiate in good faith; to the contrary, Qwest's not terminating the ICA showed that it was indeed negotiating in good faith and trying to work with AZDT, and giving AZDT the benefit of the doubt.[3]

From the outset, Qwest had decided it should work with *all CLECs* to modify their ICAs within the ICAs' change of law process as a result of the *TRRO*. Qwest assumed that CLECs would act in good faith, even to the extent that when AZDT did not convert its UNE-P circuits during the transition period established by the FCC, Qwest continued to honor the existing obligations in the ICA, in the good faith belief that the change of law would likewise be honored by CLECs, *including AZDT*, and as a corollary, that back-billing would make Qwest whole when the conversions were in fact completed. The Decision, however, effectively *punishes Qwest* because of Qwest's good faith efforts to implement the *TRRO* and to balance that implementation with proper respect for and adherence to the procedures set forth in the parties' ICA. The Decision also effectively punishes Qwest for tacitly acquiescing, however *reluctantly*, in the face of AZDT's insistence, to await the outcome of the Arizona federal court action arising from the Qwest/Covad arbitration, especially since it would have been futile to continue negotiations under the circumstances. (See e.g., Ex. 1, Christensen, p. 8:1-13; Ex. 11,

[3] Indeed, the record was replete with examples of AZDT's intransigence, and Qwest's patience with AZDT, including a 13-month hiatus in negotiations because it was clear the parties would not be able to make progress until the Arizona federal court ruled on the Arizona Commission Covad arbitration order, and thus that further negotiations at that point would have been futile. (See e.g., Exhibit ("Ex.") 1, Christensen, p. 8:1-13; Ex. 11, Christensen, p. 7:9-11; Transcript ("Tr."), pp. 24:7-25, 26:1-16, 44:19-45:2, 47:1-48:11.) The record was also clear that of the hundreds of CLECs that Qwest has dealt with, AZDT was the only one that took the positions that it took. (Ex. 7, Easton, pp. 8:14-17, 20:3-6; Ex. 14, Easton, p. 3:1-3; Exs. 13, 17; Tr., p. 48:12-15.) This in itself shows that Qwest was patiently bending over backwards in negotiating with AZDT in good faith, and that it was *AZDT*, and *only AZDT*, who dragged its feet and failed to negotiate in good faith. Yet the Commission's Decision in effect gives AZDT the benefit of an invalid Section 271 rate argument that AZDT used to delay this matter, especially given that AZDT itself suggested all along that it would withdraw that demand if Qwest prevailed in the Covad-Qwest appeal. (See e.g., Ex. 17 (AZDT's former counsel requested on March 3, 2006 that Qwest allow the Covad-Qwest appeal to play out before arbitrating the amendment, indicating that if Qwest prevailed, AZDT would drop the request to have the commissions determine a new Section 271 element rate); Ex. 5 (AZDT stated on June 8, 2006 that the Covad-Qwest appeal would provide a compelling answer to the parties' dispute); Ex. 12 (AZDT's former counsel reiterated on May 24, 2007 that the outcome of the Covad-Qwest appeal would be dispositive and resolve the parties' dispute). However, although AZDT dropped its demand in the amendment to have the commissions set the Section 271 rate after Qwest had prevailed in the Covad appeal, it instead now began to argue that Qwest's tariffs provided no back-billing. AZDT thus completely abandoned its earlier negotiation offer to allow for the Covad-Qwest appeal to be dispositive on the parties' dispute.

Christensen, p. 7:9-11; Tr., pp. 24:7-25, 26:1-16, 44:19-45:2, 47:1-48:11 (Mr. Christensen testifying that there was no outright agreement to suspend negotiations other than the fact there was certainly no sense the parties could come to agreement without the court order on the Covad ICA, and thus it was more a necessity than an agreement under the circumstances, but that Qwest made clear that back-billing and true-ups would apply).)

In addition, there was really no compelling reason to "terminate" the existing ICA since AZDT had expressly indicated it did not want to negotiate an entire new ICA, and thus the parties agreed the *existing ICA* would be amended to include *TRO/TRRO* terms and conditions. (Ex. 1, Christensen, p. 4:4-16; Tr., pp. 33:20-34:4.) Indeed, there was no real need (and would have made little sense) to terminate the existing ICA, and then start from scratch negotiating a new one. The termination would have undoubtedly led to litigation before this Commission of the same issues that were then before the federal court in Arizona. If the old ICA had been discarded, the *TRRO* issues *would still have had to have been negotiated.* Thus, negotiating a new ICA would *not* have eliminated the *TRRO* issues here, but instead, would have simply added numerous additional issues that the parties did not need to negotiate or address at that time.

There was also no real need to terminate the existing ICA because the parties' ICA already specifically has a provision for "resale" of what would be the UNE-P elements, and AZDT was continuing to use that service available under its ICA. (Tr., pp. 86-87, 93.) Further, even if AZDT had agreed to enter into a commercial QPP agreement for these (now) non-UNEs, there would have been no compelling reason to terminate the existing ICA because there would still be other products and services under the ICA that AZDT might want to continue purchasing under the existing ICA.

Further still, the Decision, or at least its finding (or implication) that Qwest should have simply "terminated the ICA" (on 160-days notice), could well have the effect of forever changing Qwest's willingness to give CLECs the benefit of the doubt with respect to transitions resulting from clear changes in law orders that are in Qwest's favor. To the contrary, if the Decision on this issue is not reversed and thus stands as it is, Qwest will likely now feel

compelled to unilaterally and immediately begin billing rate changes, transition services to other Qwest alternatives, disconnect services, or simply terminate ICAs (to the extent Qwest could lawfully do so), in order to avoid the financial losses that could otherwise be sustained by Qwest (and that it would sustain under the Decision here), and without giving CLECs an opportunity for an orderly way to accomplish such changes, or provide for an orderly transition. Conversely, if allowed to stand, the Decision would likely have the effect of discouraging ILECs from negotiating quickly to amend agreements to comply with changes in law in CLECs' favor.

Finally, as Qwest has noted previously, yet another effect of the Commission's partial ruling in AZDT's favor, if allowed to stand, is that *more disputes would inevitably end up before the Commission.* That is, parties to ICAs (ILECs and CLECs alike) would have little if any incentive to cooperate, or to negotiate in good faith, and thus the end result would be that Qwest would need to terminate ICAs whenever and wherever possible, and thus force CLECs and Qwest into more arbitrations and interconnection complaints before the Commission.[4]

B. Qwest's continuing to provide unbundled UNE-P services to AZDT showed its good faith and its following the law

Likewise, Qwest's continuing to provide unbundled UNE-P services to AZDT showed its good faith. As Qwest made very clear here, its reading of the *TRRO* from its inception was that the *TRRO* was required to be implemented through *modifications to the ICAs* between the ILECs and the CLECs under the ICAs' *change of law provisions*. (Ex. 11, Christensen, p. 2; Tr., pp. 28-30, 32-33, 36, 47, 60, 65, 82 (Qwest testimony that AZDT had an ICA with a UNE-P provision and that Qwest did not believe it could unilaterally charge the "plus $1" transitional rate or the resale or QPP alternative rate until after the parties had amended the ICA).) In other

[4] And while Qwest could have legally filed this arbitration proceeding earlier than it did in December 2007, the Commission should be mindful that the FCC specifically directed RBOCs and CLECs to enter into ICA amendment negotiations under Section 252 to implement the *TRO* and *TRRO*. Thus, if the parties could not agree on terms, the amendment would necessarily end up in front of the Commission. However, even if all negotiations had been completed in 2005, by the time the parties had gone through the nine-month process of negotiation and an arbitration proceeding, and the Commission had issued an order obligating the parties to agree to terms on the ICA amendment, it would have been *well after March 2006*, as is the case here. Moreover, Section 252 contemplates a 135-day negotiation window before the arbitration window opens. And, of course, here AZDT had insisted that the Arizona Covad litigation be decided by the federal court before even further discussing the TRRO Amendment.

words, Qwest believed it was required to *honor the parties' contract*.[5] The *TRRO* states:

> UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate *upon the amendment of the relevant interconnection agreements, including any applicable change of law processes. TRRO*, fn. 630. (Emphasis added).

The FCC also stated:

> Consequently, carriers have twelve months from the effective date of this Order *to modify their interconnection agreements, including completing any change of law processes. TRRO*, ¶ 227. (Emphasis added).

Accordingly, as Qwest showed, Qwest decided that it should work with *all CLECs* to modify their ICAs within the ICAs' change of law process, and assumed that CLECs would act in good faith. Thus, even when AZDT did not convert its UNE-P circuits during the *TRRO* transition period, Qwest gave AZDT the *benefit of the doubt* by continuing to honor the ICA's existing obligations, in the good faith belief that the change of law would likewise be honored by AZDT, and as a corollary, that (even though AZDT did not "agree" to or want a true-up) back-billing would make Qwest whole when the conversions were in fact completed.[6] However, not only was AZDT the *only CLEC* to argue that Qwest had somehow given up its rights because of its good faith efforts to implement the *TRRO*, and to balance that implementation with proper respect for and adherence to the procedures set forth in the parties' ICA, but *the Decision* itself improperly allows AZDT to *profit* from such foot-dragging and bad faith negotiation tactics.[7]

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[5] The mere fact that the parties' ICA was on a "month-to-month" basis, or that it had a 160-day notice period, did not change the fact that the ICA was still in force and that Qwest could not unilaterally terminate it without having to then negotiate (if AZDT was even willing to negotiate) a replacement ICA. (See Tr., pp. 32-33.)

[6] Qwest is not in the business of disconnecting a CLEC's service merely because the ICA has not yet been amended. (Tr., pp. 97:13-98:3.) Moreover, despite AZDT's inflammatory rhetoric in its post-hearing Statement of Position about Qwest trying to get drive AZDT out of business, the opposite is true- Qwest made all reasonable attempts to not drive AZDT out of business. Indeed, AZDT's witness Tom Bade admitted that Qwest told him that it wanted AZDT "to stay in business." (Tr., p. 137:12-19.)

[7] Qwest also notes that in the *TRRO* non-impaired wire center dockets throughout Qwest's region, including in Colorado (Docket No. 06M-080T), the CLECs all agreed to back-billing back to the effective date of the TRRO, and the commissions in Utah, Oregon and Minnesota have approved the parties' settlement agreement.

C. Qwest's continuing to bill AZDT for such services at the unbundled rate called for by the ICA showed its good faith and its following the law

Likewise, the mere fact that Qwest continued to "bill" AZDT for such services at the unbundled rate is simply the other side of the coin that Qwest continued to provide unbundled UNE-P services to AZDT. Although AZDT made much ado about Qwest's actions by breaking down Qwest's continuing to (1) *provide* UNE-P services to AZDT with its corollaries of (2) Qwest's continuing to *bill* AZDT for such services at the UNE-P rate, and (3) AZDT's *payment* of that UNE-P rate, and (4) Qwest's *acceptance* of AZDT's payments (presumably to try to make it appear as multiple (inappropriate) actions by Qwest), these are all really *one and the same thing*. The main point, however, as expressed in the preceding section, is that Qwest's continuing to provide UNE-P services to AZDT (which necessarily then entailed (and required) Qwest to *bill* AZDT for such services, and AZDT to *pay* for such services, and Qwest to *accept* such payments), was because Qwest had *honored the parties' existing ICA*. Such actions are also further evidence that Qwest gave AZDT the benefit of the doubt (as it did with all CLECs it deals with) that AZDT (and other CLECs) would act and negotiate in good faith. Qwest respectfully submits that it should *not* be punished by the Commission for doing so.[8]

D. Qwest's continuing to accept AZDT's payments at the UNE-P rate showed its good faith and its following the law

For the reasons set forth above, Qwest's "accepting" of AZDT's "payments" at the UNE-P rate for the unbundled services it provided during the applicable time period that Qwest was trying to work with AZDT in good faith is really all related to the discussions in sections II.B. and II.C. above. More importantly, from a substantive standpoint, Qwest's continuing to "accept AZDT's payments" at the UNE-P rate for the services that Qwest continued to provide simply

[8] Of course, Qwest has no doubt that if it had unilaterally "billed" the higher rates to AZDT, without amending the ICA, and had thereafter attempted to disconnect AZDT's services for non-payment, AZDT would have complained to this Commission (and others) that Qwest could not charge the higher rates, or send a true-up bill, until *after* the ICA amendment were executed, and thus, that Qwest could not disconnect such services. (Ex. 11, Christensen, p. 7; Tr., p. 37.) The Decision, however, in punishing Qwest because it chose to honor the existing ICA by not billing the higher rates in the absence of an amendment, essentially *rewards* a bad faith CLEC. The Decision also signals to the CLEC community that Qwest will be "darned if it does" (if Qwest unilaterally bills the new rate without an amendment), and "darned if it doesn't"(if Qwest continues to bill under the existing ICA).

showed that Qwest continued to honor the parties' ICA, and that Qwest was negotiating in good faith, and thus was giving AZDT the benefit of the doubt. Such continuation also shows that Qwest was attempting to avoid having to burden the Commission with *unnecessary arbitrations* of issues that the parties should have been able to negotiate themselves (but for AZDT's foot-dragging and bad faith negotiation tactics).

E. Qwest's continuing to accept new orders from AZDT for local circuit switching showed its good faith and its following the law

The last of the items that the Decision cited in paragraph 55 was that Qwest continued to "accept new orders" from AZDT for local circuit switching. However, as Qwest has shown, and as with Qwest's continuing to provide unbundled UNE-P services to AZDT (and its billing and accepting payment therefor), this was again all due to the fact that Qwest was honoring the parties' ICA that was still in existence (but that Qwest was in the meantime trying to negotiate to make *TRRO*-compliant). Thereafter, however, Qwest determined, based on a growing body of legal decisions, that it could begin refusing *new orders* or *changes to existing orders*, which in Qwest's view was permitted by then-recent federal court interpretations of the FCC's *TRRO*. (See Exs. 16, 13; see also Tr., pp. 48:16-23, 85:13-22.)[9] Thus, based on those court decisions, Qwest came to the belief that it no longer needed a change of law amendment to deny such new orders, and therefore, it did in fact begin to refuse new orders in May 2007.

Again, Qwest respectfully submits the Commission should not punish Qwest by allowing a foot-dragging CLEC to be rewarded monetarily because of its successful bad faith negotiation tactics, or because of Qwest's ultimately good faith but unsuccessful attempts to work with such CLEC. Also, Qwest does not believe that the Commission intends to infer that Qwest should not

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[9] Indeed, federal district courts in Georgia, Kentucky and Mississippi and the Eleventh Circuit Court of Appeals had at that time confirmed that the FCC's ban on *new* UNE-P orders was self-executing. See e.g., *BellSouth v. MCIMetro*, 2005, U.S. Dist. Lexis 9394, at *8 (2005), *aff'd* 425 F.3d 964 (11th Cir. 2005); *BellSouth v. Cinergy*, 2006 U.S. Dist. Lexis 11535, at *25 (E.D. Ky. 2005); *BellSouth v. Mississippi PSC*, 368 F. Supp. 2d 557, 562 (S.D. Miss. 2005). (See also Ex. 13; Tr., pp. 48:16-23, 85:13-22.)

The FCC clearly contemplated in the *TRRO* that an RBOC would not send the true-up bill to a CLEC until *after the ICA amendment was executed.* Thus, Qwest's ability to charge the higher rates was not self-executing, and the *BellSouth* decisions held that only the bar on *new UNE-P orders* was "self-executing" without the parties first entering into a *TRO/TRRO* amendment under the Section 252 process.

abide by its written contracts without specific orders to do otherwise, which the Decision could be interpreted to indicate. Qwest has already pointed out that the FCC expected the parties to amend the agreements and abide by the change in law process.

F. Qwest was not obligated to offer any other rate during the transition period, or to offer any rate other than resale or QPP thereafter

The Decision also noted that "during the course of their negotiations concerning the TRRO Amendment, Qwest took the position that the transition rate called for by the TRRO during the transition period was non-negotiable and, therefore, it offered AZDT no other rate." Decision, ¶ 56. The Commission did not make any specific finding that Qwest's position regarding a non-negotiable transition rate was somehow unlawful or improper (and indeed, Qwest showed that it was not unlawful or improper). Nevertheless, the clear implication of that paragraph is that the Commission is faulting Qwest for not offering AZDT another rate other than the "plus $1" transition rate that the *TRRO* specifically set. Thus, to the extent that the Decision's statement finds or implies that Qwest's actions in this regard were unlawful, or improper, or somehow evidenced a failure to negotiate in good faith, that finding would be just plain wrong, and the Decision certainly does not provide, or cite to, any basis for such a legal conclusion. As Qwest noted, and as cannot reasonably be disputed, the matters about which Qwest would not negotiate were those about which it had *no obligation to negotiate*, or *could not negotiate* without violating its duty of non-discrimination. (Ex. 1, Christensen, p. 6:2-9; Ex. 11, Christensen, pp. 4:13-6:2; Tr., pp. 49:18-50:20.)

Indeed, the Decision's statement in the first sentence of paragraph 56 does not explain or cite to any basis why Qwest's refusal to negotiate something different than the FCC-ordered transition rate would have been somehow unlawful or objectionable.[10] In fact, Qwest was *not*

[10] The Commission should also be mindful that Qwest has a duty not to discriminate in favor of AZDT and against other CLECs. (Tr., p. 142:8-11.) The record was clear that Qwest had not offered any CLEC any rate other than the FCC-mandated TRRO transition rate during that transition period. In addition, Qwest further notes that the entire basis for the *TRRO* was that the FCC had determined that CLECs like AZDT are no longer "impaired" without UNE-P or unbundled mass market switching. (See e.g., Tr., pp. 64:8-65:7, 74:23-75:10, 93:14-94:2.) As such, Qwest (or any other RBOC) was no longer under any obligation to offer UNE rates, or any particular rate, for these now non-UNEs.

under any obligation to negotiate a different rate for the continuation of UNE-P. Paragraph 228 of the *TRRO* states that the transition period that the FCC provided was a *default* process, and that "carriers remain free to negotiate alternative arrangements superseding this transition period." Footnote 633 to paragraph 228 shows what the FCC had in mind when it spoke of "alternative arrangements." Footnote 633 cites the very first QPP-type of commercial agreement that Qwest entered, by which Qwest agreed to provide a combination of arrangements that offered the same functionality as did UNE-P, as a commercially-negotiated agreement. This reference makes clear that the "alternative arrangements" that the FCC contemplated in paragraph 228 were for alternative *service* arrangements (i.e., services providing an alternative to the continuation of UNE-P), and did *not* contemplate that carriers would bargain for a different rate than the FCC established for UNE-P during the transition period, or that the parties would keep the status quo as such "alternative arrangements." Qwest was absolutely entitled to insist on the FCC's transition rate.[11]

Likewise, the second sentence of paragraph 56 of the Decision states that "during the course of the negotiations, the only options Qwest offered AZDT for local circuit switching after the expiration of the transition period (post-transition period) were to purchase such services at Qwest's resale rate, or to enter into a new commercial agreement for QPP." Decision, ¶ 56. Again, however, the Commission did not make any specific finding that Qwest's position in this regard was somehow unlawful or improper (and Qwest showed it was not unlawful or improper). Nevertheless, the clear implication again is that the Commission is faulting Qwest for not offering AZDT any rate other than resale or QPP after the transition period had expired. Once again, however, to the extent that the Decision's statement finds or implies that Qwest's actions in this regard were somehow unlawful or improper, or evidenced a failure to negotiate in good faith, the statement likewise would be wrong. Again, as Qwest noted, the matters about which Qwest would not negotiate were those about which it had *no obligation to negotiate*, or *could not*

[11] Of course, AZDT was not obligated to purchase anything from Qwest. If AZDT did not like Qwest's resale or QPP alternatives, it had other options, such as to install its own switch, to buy unbundled loops, or to acquire the services from other parties. (Tr., p. 20:9-21.)

negotiate without violating its non-discrimination duty. (Ex. 1, Christensen, p. 6:2-9; Ex. 11, Christensen, pp. 4:13-6:2; Tr., pp. 49:18-50:20.)

Specifically, regarding the post-transition rate, and Qwest's offer of either the PAL and POTS resale rates or the QPP commercial agreement, Qwest notes that it was *not obligated to offer any other rate*. Moreover, and as Qwest noted in its post-hearing Statement of Position (p. 19), 1) the resale rate is fixed by tariff and this Commission's decision in Docket No. 96S-331T establishing no wholesale discount for PAL resale services; 2) the QPP rates are established by contract with other carriers who have not shirked their duty to convert (Ex. 1, Christensen, p. 6:4-10; Ex. 11, Christensen, p. 5:6-14); and 3) in neither situation could Qwest have lawfully discriminated in favor of one CLEC over others, which would have been the case if it had negotiated a more favorable rate for AZDT (*id*). Again, while the Commission makes its statement on paragraph 56 of its Decision, and implies that perhaps Qwest should have offered something else, the Decision does not cite to any *obligation* by Qwest to have done so.[12]

Accordingly, for the reasons stated above, it is clear that the *only rates* that the parties could have lawfully agreed upon for the alternative services were those that Qwest has asked to be paid. This is a question of law, and the Commission should have ruled in Qwest's favor. Thus, Qwest respectfully submits that the Commission should grant rehearing, reargument or reconsideration, and thus strike paragraph 56 in its entirety, and/or make clear that its statements on paragraph 56 do not have any legal significance, and that such statements do not mean (and should not imply) that Qwest was under any obligation to offer any rate other than what it did offer. Further, to the extent such statements formed *any basis* for the Commission's conclusion that Qwest was partially "at fault," and/or that Qwest somehow failed to negotiate in good faith, the Commission should reconsider this portion of the Decision under the circumstances.

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[12] To the extent that the Commission's statements on paragraph 56 were based in part on AZDT's repeated complaints about Qwest's negotiation style as allegedly being on a "take it or leave it," "my way or the highway," "our way or no way," or "here it is, this is it" basis, or that Qwest refused a "face-to-face meeting" (Ex. 15, Bade, pp. 5:24-6:8; Tr., pp. 127:19-20, 132:14-15, 133:5-6, 133:17-134:5, 137:24-25), the Commission should disregard and expressly ignore such complaints. As with so many other things that AZDT testified to or argued in its post-hearing Statement of Position, these complaints have *no legal significance*, and were clearly simply inappropriate attempts to appeal to emotion or to engender sympathy.

G. The fact Qwest could have chosen to terminate the ICA, follow through with dispute resolution, or pursue arbitration, but did not, did not demonstrate a failure to negotiate in good faith, but again, actually demonstrated good faith

Finally, in paragraph 59 of the Decision, the Commission concluded by referencing its previous discussion (presumably paragraph 55), and thus stated that Qwest had "contributed" to the failure to reach an agreement to modify the ICA. Specifically, the Decision states that at any time during the transition period, or after, "Qwest could have chosen to 1) terminate the ICA; 2) follow through with dispute resolution; or 3) pursue arbitration," but that "Qwest took none of these actions" (and instead, continued to process new UNE-P orders, bill at UNE-P rates and suspended negotiations for a 15-month period). Decision, ¶ 59. Again, however, the fact that Qwest did not take such actions did not demonstrate a failure to negotiate in good faith, and instead, such inactions actually demonstrated its good faith.

Qwest has already discussed why it did not attempt to terminate the ICA. (See § II.A., above.) Further, with respect to following through with the "dispute resolution process," the evidence was clear that Qwest had intended to do so, but that it would have been *futile* to do so, especially since AZDT later refused to sign the *TRRO* Amendment or negotiate based on its reliance on the Arizona Commission's Covad order. As such, negotiations essentially stopped, even though that was not Qwest's preference. (Ex. 1, Christensen, p. 8:1-13; Ex. 11, Christensen, p. 7:9-11; Tr., pp. 24:7-25, 26:1-16, 44:19-45:2, 47:1-48:11.) Although Qwest clearly disagreed with any "suspension" of negotiations merely because of the Arizona Covad order (which Qwest was appealing to federal court), it nevertheless became clear that it would have been futile to continue negotiations, and thus there was no reason to continue to argue over the *TRRO* Amendment issues. This was especially so since the key change of law in the Arizona Covad appeal, and the one that impacted AZDT, was, in fact, the FCC decision that Qwest was no longer required to provide to CLECs like AZDT the switch port at TELRIC rates. Seeing the futility in proceeding with negotiations with a party who was unwilling to accept even the plus $1 rate, Qwest really had no choice but to allow the negotiation window to close without initiating arbitration action while awaiting the federal court's ruling. (Ex. 1, Christensen, p. 8:1-

13; Ex. 11, Christensen, p. 7:9-11; Tr., pp. 24:7-25, 26:1-16, 44:19-45:2, 47:1-48:11 (Mr. Christensen testifying there was no outright agreement to suspend negotiations other than the fact there was certainly no sense the parties could come to agreement without the court order on the Covad ICA, and thus it was more a necessity than an agreement under the circumstances, but that Qwest made clear that back-billing and true-ups would apply).) Qwest, however, should *not be made worse off* (by not being able to back bill for that 13-month time period). this is especially so because the Decision in effect gives AZDT the benefit of an invalid Section 271 rate argument that it used for purposes of delay, and especially given that AZDT itself suggested all along that it would withdraw that demand if Qwest prevailed in the Covad-Qwest appeal. (See e.g., Exs. 17, 5, and 12, and fn. 3.)

Finally, although Qwest did not initiate arbitration until December 2007, the reasons are essentially four-fold. First, as made exceedingly clear above, Qwest was trying to work with AZDT in good faith, and thus avoid having to burden AZDT, and *this Commission*, with an unnecessary arbitration. (See e.g., Argument, § II.A.) Second, as discussed immediately above, it would have been *futile* to continue the negotiation or dispute resolution process while the Arizona Commission's Covad arbitration order was on appeal, and thus the net effect was that negotiations were essentially put on hiatus for 13 months (from June 2006 to July 2007). Third, as soon as it became clear that the federal court had ruled in Qwest's favor in the Covad matter in Arizona (July 2007), Qwest immediately (within two days) began the Section 252 negotiation process, and thereafter timely filed the present arbitration proceeding in December 2007. Fourth, Qwest was led to believe, based upon communications with AZDT and its redline amendment proposal which did not strike Qwest's back-billing language, that if the court were to overturn the Arizona Covad arbitration order regarding 271 TELRIC pricing, AZDT would then accept the Qwest back-billing language. (See e.g., Exs. 17, 5, 12 and 19-20, and fn. 3.)

Accordingly, Qwest respectfully submits there is no basis for the Decision's conclusion that Qwest somehow "contributed" to the "parties' failure" to reach an agreement to modify the ICA. Moreover, given the substantive positions that AZDT took throughout negotiations (and in

this proceeding), it was ultimately clear that nothing short of an arbitration, which Qwest brought as soon as practical (as discussed above), and this Commission's ruling on the substantive amendment issues, would have resulted in any modification of the ICA. In other words, the failure to reach agreement was solely at the hands of AZDT. Thus, Qwest respectfully submits that the Commission should grant rehearing, reargument or reconsideration, and thus find that the failure to negotiate in good faith was solely *AZDT's,* and therefore, that the Commission adopt the TRRO Amendment that Qwest has submitted in this proceeding in its entirety.

III. The evidence was exceeding clear that AZDT affirmatively failed to negotiate in good faith and, indeed, dragged its feet and negotiated in bad faith throughout

There is simply no credible argument to suggest anything other than that (1) AZDT continually dragged its feet, (2) AZDT failed to negotiate in good faith, and in fact, it negotiated in *bad faith*, and (3) the foot-dragging should have stopped long before it did. Qwest will not burden this motion with all of the evidence, but simply refers the Commission to pages 7 through 13 of its post-hearing Statement of Position, as well as its discussion about AZDT's bad faith negotiation conduct (especially pages 17-23 and 27-34). Suffice it to say, however, that (1) AZDT's dilemma was of its own making, (2) AZDT unquestionably dragged its feet throughout the relevant time period, (3) AZDT's later position that the month-to-month resale rate post-transition is appropriate *prospectively* was a concession that the resale rate was appropriate all along (and thus that its previous positions had no merit), (4) AZDT's conduct repeatedly conflicted with its legal positions, (5) AZDT lowered the discussion to inappropriate appeals to emotion and sympathy, and (6) there are numerous policy reasons why this Commission should grant rehearing, and thus not allow AZDT to profit from its foot-dragging, as well as to not send inappropriate signals to other parties that they too may be rewarded by foot-dragging and failures to negotiate in good faith.

In short, AZDT does not deserve the partial relief that this Commission, in seemingly attempting to balance equities or find a compromise solution, has provided to it in the Decision. Qwest respectfully submits that the Commission should reconsider the Decision.

IV. The Decision sends the wrong public policy signals to parties and encourages foot-dragging and bad faith negotiations for changes of law that do not benefit them

Finally, the Decision sends the wrong public policy signal to parties and encourages foot-dragging and bad faith negotiations for changes of law that do not benefit them. This goes both ways with CLECs and with ILECs, alike. Thus, for a number of practical business and policy reasons, the Commission should reconsider the Decision.

For example, the Decision, in which the Commission essentially rewards AZDT with at least a *65% savings* (windfall) of the back-bill amounts it would have owed to Qwest had the Commission adopted Qwest's TRRO Amendment language in its entirety, sends the clear signal that AZDT is to be *rewarded* for its repeated foot-dragging and failures to negotiate in good faith. Moreover, even if the Commission did not believe Qwest was as assertive or as decisive as it could have been (or should have been), Qwest does not believe that this conclusion is a good reason to reward the party (AZDT) who clearly (and affirmatively) dragged its feet and shirked its duty to negotiate in good faith and to comply with the clear orders of the law. There is no reasonable comparison of Qwest's actions, or inactions (like continuing to provide AZDT with UNE-P services at UNE-P rates in the interim, or not immediately terminating the ICA or filing for arbitration), with AZDT's *intentional acts* of dragging its feet and playing hide and seek or the four-corner stall. And yet, in its apparent attempt to fashion a middle-ground remedy, or balance the equities, the Commission essentially rewards AZDT with at least a *two-thirds victory*, when AZDT should have *no victory at all*, all because the Commission apparently concluded that Qwest was not as decisive (or as prompt or assertive) as it *could* have been.

In addition, the Decision (if it stands) could well forever change the willingness of other CLECs in Colorado (and possibly throughout Qwest's region) to negotiate in good faith in order to amend their ICAs to comply with changes in law that are in Qwest's favor.[13] The Decision has essentially created very bad public policy by ruling that by a CLEC dragging out

[13] Obviously, the Act and the *TRRO* make clear that CLECs have as much obligation to comply with change in law orders as does Qwest. (Tr., p. 91:11-19.) The FCC in the *TRRO* clearly stated that CLECs were to transition their services to alternatives no later than March 10, 2006. If AZDT truly did not believe it was receiving an acceptable rate for a Qwest service alternative, it should have transitioned as much of its services as possible to other providers by then. However, it did not do so until very recently.

negotiations, while Qwest patiently continues in good faith to take orders and leave services running pursuant to the ICA between the parties, the delaying CLEC wins. The Decision also essentially gives CLECs (and ILECs as well) the incentive to delay signing any ICA amendments (or enter into new ICAs) if such amendments or changes of law might be detrimental to their business interests. The Decision clearly tells Qwest to ignore the ICA and immediately quit processing CLEC orders in the future if an amendment has not yet been signed, and to not process orders in the interim, no matter the consequences to such CLECs (because Qwest would be punished (like here) for attempting to show good faith).

Further, if left standing, the Decision would have the effect of forever changing Qwest's willingness to give CLECs the benefit of the doubt regarding transitions resulting from clear changes in law orders that are in Qwest's favor. To the contrary, Qwest will now feel compelled to unilaterally and immediately begin billing rate changes, to transition services to other Qwest alternatives, or to disconnect services, in order to avoid financial losses (like those at least 65% losses here) that would otherwise be sustained by Qwest, without giving CLECs an opportunity for an orderly way to accomplish such changes or to provide for an orderly transition. The Decision also would likely have the effect of discouraging ILECs from negotiating quickly to amend agreements to comply with changes in law that are in CLECs' favor.

Further still, another effect of the Decision if it is not modified would be that more disputes would likely end up before the Commission before they are completely negotiated and thus would expend the Commission's resources unnecessarily. That is, ILECs and CLECs alike would have little if any incentive to cooperate, or to negotiate in good faith, on these types of change of law issues. Thus, the end result would likely be more litigation, and more arbitrations and interconnection complaints before this Commission.

Finally, apart from the Section 271 issue discussed in Section I, the Decision essentially in AZDT's favor regarding Qwest being allowed to back bill only the UNE-P "plus $1" rate beyond the one-year transition period is clearly in violation of the clear language of the *TRRO* that CLECs *must transition their services* by the end of the one-year transition period. Indeed, it

is clear in the *TRRO* that the FCC fully (and explicitly) expected that rates for alternative services after March 11, 2006 would be higher than UNE-P rates, and higher than UNE-P rates plus $1, even though no alternative service was mandated. The FCC clearly wanted to encourage CLECs to invest in their own switches and to stop using RBOCs' switches at artificially low prices. See e.g., *TRRO*, ¶¶ 24, 205 (the FCC discussing its views of a reasonably efficient competitor and of evidence of competitive switch deployment when it decided to eliminate unbundled mass market switching from the list of UNEs). The Decision, however, essentially keeps the March 2005-March 2006 transition status quo for an *additional 16 months*, at a substantial benefit to AZDT (indeed, at least 65%, or *hundreds of thousands of dollars*) for its foot-dragging troubles. The Decision simply rewards AZDT's delays and bad faith negotiation conduct, as well as AZDT's inefficiencies and failures to plan for the inevitable (a post-UNE environment).

In short, the Decision has the presumably unintended consequences of providing CLECs with the incentive to delay or game the system by rewarding AZDT here, and by unjustly punishing Qwest for attempting to work with this particular CLEC in good faith. It further punishes (and discriminates against) those numerous other CLECs who *had* complied in good faith with these *TRRO* changes in law. These policy considerations all point to the fact that the Commission should reconsider its Decision that is partially (and substantially) in AZDT's favor, and thus should adopt the TRRO Amendment that Qwest submitted *in its entirety*.

V. The Commission should order that AZDT is obligated to comply with the Decision, or any modification of the Decision, pending AZDT's planned appeal

Finally, the Commission should order that AZDT is obligated to comply with the Decision, or any modification of the Decision, pending AZDT's planned appeal. This request is necessary because AZDT has recently advised Qwest that it not only disagrees with Qwest about the amounts it owes under the Decision, but that it plans to appeal the Decision. Given AZDT's foot-dragging conduct since 2005, there is no question that this is just another attempt by AZDT to delay compliance with the Decision (or any modification of the Decision on reconsideration),

because of AZDT's planned appeal.

The law in Colorado is clear that absent a stay of a Commission decision, the parties must comply with such decision even if it appeals the decision. § 40-6-116, C.R.S. Because AZDT's planned appeal does not automatically stay the effect of the Commission's decision, Qwest respectfully submits that the Commission should specifically order AZDT to comply with the Commission's final decision, and thus sign the TRRO Amendment that the Commission orders.

CONCLUSION

Accordingly, for all of the reasons set forth above, Qwest respectfully submits that the Commission should grant this motion for rehearing, reargument or reconsideration of the portion of the Commission's Decision No. C08-0414 pertaining to the back-billing of the UNE-P plus $1 rate for the period from March 10, 2006 to July 19, 2007, and thereafter, modify the Decision to adopt the TRRO Amendment that Qwest submitted in this proceeding in its entirety.

Respectfully submitted this 8th day of May, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2008, an original plus 7 copies of the foregoing **QWEST'S CORPORATION'S APPLICATION FOR REHEARING, REARGUMENT OR RECONSIDERATION OF DECISION NO. C08-0414** was hand-delivered to:

Doug Dean, Director
Colorado Public Utilities Commission
1560 Broadway, Suite 250
Denver, CO 80203

and a copy was placed in the United States mail and/or sent via electronic mail to the following:

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